

No. 19,882

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC LAND COMPANY,	} <i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	} <i>Appellee.</i>

Appellant's Petition for Rehearing

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FILED

NOV 10 1986

WM. B. LUCK, CLERK

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*To the Honorable Frederick G. Hamley, James R. Browning, and
Ben. C. Duniway, Circuit Judges:*

Appellant Southern Pacific Land Company respectfully requests a rehearing in this case upon the following grounds:

- I. The United States, Southern Pacific Land Company, and All Citizens Who Own Property Subject to Condemnation Are Entitled to a Decision on the Jurisdiction of the Court to Review a Taking Alleged to Be in Bad Faith, Arbitrary, Capricious or an Abuse of Discretion**

In its decision filed herein this court refused to pass upon the jurisdiction of the District Court or this court to determine whether or not the taking of appellant's oil, gas and mineral rights was in bad faith or capricious or arbitrary.

From the very beginning the United States has relied entirely upon its position that the declaration of taking was final and that

the court had no jurisdiction to review that taking. The importance it placed upon obtaining a judicial determination to this effect is illustrated by the fact that it stipulated to a judgment fixing the fair market value of the property taken at \$1,250,000.00 regardless of whether or not it finally obtained the oil, gas and mineral rights. The stipulation expressly left open for judicial determination the question of the finality of the taking of those rights.

At the trial the United States chose to rely entirely upon lack of jurisdiction and refused to cross examine any of defendant's witnesses or to present any evidence on its own behalf. It considered the importance of obtaining a final decision on this question so great that it was willing to risk losing the oil, gas and mineral rights which were valued, according to the undisputed testimony, at over a quarter of a million dollars.

At the hearing on appeal, the Assistant United States Attorney stated in open court that in the event the question of jurisdiction was determined against him he did not wish the case to be remanded for retrial or further evidence in the District Court.

Southern Pacific Land Company was equally anxious to have a decision in its favor upon this question. It also stipulated to the fair market value of the whole property, leaving open the question of the court's jurisdiction, thereby taking the risk of losing the oil, gas and mineral rights without further compensation.

The District Court joined with the parties in this effort to obtain a clearcut decision on jurisdiction. Its judgment was based entirely upon an express written finding that it did not have jurisdiction. It made no finding upon whether the Assistant Secretary of the Navy acted in good faith or whether he acted arbitrarily or capriciously or in abuse of his discretion.

The reason the parties and the trial court placed so much importance on the final answer to this question is clear. The United States is faced with the question every time it makes a decision to take property. Every owner of land is faced with it when and if he seeks to resist a taking of his land. The number

of decisions upon the subject and the conflict in those decisions demonstrate the unsatisfactory state of the law.

The parties have done everything possible for them to do to obtain such a determination. The District Court has done likewise. This court now has the problem directly before it. We respectfully ask that the court grant a rehearing and determine the question.

II. This Court Erred in Stating That the District Court Held That There Was No Evidence to Support the Allegation of Bad Faith or Arbitrary or Capricious Conduct

The statement of this court here referred to is based upon the District Judge's memorandum opinion. This court says that it may properly consider that memorandum opinion as a part of the findings *if it is consistent with formal findings*, serving merely to supplement them. This statement answers itself. The actual finding of the court was that it had "no jurisdiction to review or interfere with the determination of the Assistant Secretary of the Navy." If the court had no such jurisdiction it had no jurisdiction or power to find that the Assistant Secretary of the Navy did or did not act in bad faith or arbitrarily or capriciously. Clearly such finding, whether contained in the memorandum opinion or in the findings themselves, would be completely inconsistent with the finding that it had no jurisdiction to review the Secretary's decision.

III. In the Absence of Jurisdiction to Review the Decision of the Assistant Secretary of the Navy This Court Cannot Find That the Evidence Does Not Support the Allegations of Bad Faith or Arbitrary or Capricious Conduct

Again, this statement speaks for itself. It would seem completely clear that until this court decides that it has jurisdiction to review the decision of the Assistant Secretary of the Navy to take defendant's oil, gas and mineral rights it cannot determine that the Assistant Secretary's decision was not in bad faith or arbitrary or capricious.

IV. This Court's Statement That It Was the Uncontradicted Testimony of the Assistant Secretary of the Navy That Failure to Take the Mineral Rights Would "Reduce the Marketability of the Property in the Event of Sale" Is Not Accurate

The testimony upon which the court's statement is based is found at pages 127 and 128 of the Reporter's Transcript. That testimony did not amount to positive evidence based upon any purported knowledge of the Assistant Secretary that this would be the result. He simply *assumed* that owning the mineral rights along with the surface rights might make the property "that much easier to sell". Such an assumption does not amount to evidence.

Certainly, it cannot be said that this statement was uncontradicted. The only actual evidence upon the subject is found in the testimony of Mr. Kenneth R. Evans, who appraised the properties for the purpose of this lawsuit. Mr. Evans testified that out of 37 transfers of property in the area investigated by him the mineral rights had been severed from the remainder of the estate by reservations in all but five small parcels (Rep. Tr. p. 60). These were normal sales in the ordinary course of business, not condemnation sales. The only reasonable inference is that in this locality the property sells easier where the mineral rights are severed. Until and unless the mineral rights are developed these properties sell as farm land and they sell easier without the mineral rights because the price is less.

This court states that the government is not required to proceed oblivious to elements of cost. The element of cost favors the severance of the mineral rights from the surface rights. It would seem obvious that the fair market value of the property would be less if it did not include the mineral rights.

The oil, gas and mineral rights under these lands belong to Southern Pacific Land Company. It wants to keep them. The United States cannot use them and does not intend to use them for any use authorized by the statutes. While the Secretary of the Navy should be given wide latitude in the exercise of his discretion he should not be permitted to take private property on the basis of a vague, speculative assumption, unsupported by any

evidence, which would at the most go to the *convenience* of making a resale at some remote and undetermined time in the future. No claim is made that it would affect the price at which the property might be resold. We submit that to take mineral rights upon this basis is in bad faith and is arbitrary, capricious and an abuse of discretion.

Southern Pacific Land Company respectfully requests a rehearing.

Respectfully submitted,

STAMMER, MCKNIGHT, BARNUM,
BAILEY & BARNETT

ROY JEROME
HAROLD S. LENTZ

By ROY JEROME
Attorneys for Appellant

CERTIFICATION

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

ROY JEROME

*Of Counsel for Above
Named Appellant.*

